CONSUMER CLASS ACTIONS

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Most of the great pillars of our legal system are procedural, not substantive — due process, equal protection, the right to be tried by one's peers. Just as these are the wheels on which judicial justice rides, there are similar wheels that keep the economy rolling with a degree of equity and fair play — the process of collective bargaining, commission controls, the technique of using yardsticks like TVA and REA.

But no such vehicle for justice, equity, and fair play exists for the consumer. Congress has the means of making one — one that is self-induced and self-propelling, not one that depends for its impetus upon the good motivations and energetic administration of a commission.

I. The Need for the Consumer Class Action

The consumer class action process proposed in H.R. 14585[1] and similar bills will permit consumers sharing a common complaint about a defective product or an unfair or deceptive selling practice to pool their claims against a manufacturer or seller and hire attorneys to press the class action suit in a federal court on behalf of all the plaintiffs. Put bluntly, the consumer class action is necessary because existing private legal remedies cannot meet the needs of a consumer having a litigable claim. Let us examine the various pitfalls which presently deter consumers from seeking redress in the courts and which make the consumer class action not just desirable but necessary.

A. Individual Suits by Consumers

The problem confronting the consumer who wishes to sue on his own behalf is practical in nature; it arises from harsh economic reality. Deceptive advertising, usurious interest rates, overpriced drugs and food, and adulterated meat are all wrongs that involve small amounts of money, often less than $200. Very few would be large enough to permit a wronged consumer to secure his rights through the law as a practical matter. The duped consumer is apt to have precious little money to support a test case in order to establish the rights of his fellow consumers, and, in any event, the recovery he may expect would not likely pay even the court deposit, let alone his lawyer's fee. As a result, the wronged consumer's most appropriate advocate, the private bar, is put at a severe and unnecessary disadvantage. Few attorneys, other than the very young and very idealistic, are eager to endure time-consuming litigation for a $50 fee; and a single $200 judgment is not likely to serve as a powerful deterrent to the wrongdoer. The usury laws prove this. In a study conducted under the auspices of the University of Pennsylvania, it was concluded that "[t]he number of con-

* Congressman from Texas; B.A., University of Texas, 1935; LL.B., University of Texas, 1939.

1 H.R. 14585, 91st Cong., 1st Sess. (1969).

sumers having no redress because the amount lost is not commensurate with the attorney's fee constitutes the vast majority."[2] Small claims generally do not warrant individual litigation, and the misbehaving corporations bent on bilking the consumer fully appreciate this: "In many instances, fraudulent operations carefully avoid cheating individuals out of large sums of money because they realize that 'no one bilked out of fifty dollars is going to pay a lawyer to get his money back.' "[3]

B. The Shortcomings of Existing Class Action Law

1. Hall v. Coburn Corporation

At the state level, most class action statutes are inadequate to protect the consuming public's legal rights. The case of *Hall v. Coburn Corporation*[4] dramatically illustrates the point. It involved a consumer class action brought against a finance company charged with violating the New York Retail Instalment Sales Act[5] by using contracts printed in less than eight-point type.[6] The class claimants sought to compel Coburn to refund the service charges assessed under the contracts, the penalty provided for by statute.[7] The trial court[8] and the appellate division[9] dismissed the action, following a line of New York class action cases barring class actions brought by persons whose causes of action arise out of distinct transactions, even though the transactions are similar and are with a single defendant.

The problem that confronted the NAACP Legal Defense and Educational Fund, the group that backed the plaintiffs and asserted the class's rights in *Hall,* was identical to that faced by all plaintiffs and their attorneys in like consumer cases. In such actions attorneys for the plaintiffs must be concerned not so much with the merits of the suit but with the feasibility of bringing it. If it cannot be brought as a class action, it cannot feasibly be brought at all.

Therefore, to shake the court from its strict class action rule, plaintiffs urged the court to recognize

> that the poor are victimized by this type of credit practice; that public authority is impotent to help them; and only by permitting self-help class

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2 Comment, *Translating Sympathy for Deceived Consumers into Effective Programs for Protection,* 114 U. PA. L. REV. 395, 409 (1966).

3 *Id.*

4 No. 16 (N.Y. Ct. App. May 13, 1970).

5 N.Y. PERS. PROP. LAW §§ 401-18 (McKinney 1962).

6 Section 401(1) of the Retail Instalment Sales Act provides that: "A retail instalment contract or obligation shall be dated and in writing; the printed portion thereof shall be in at least eight point type."

7 Section 414(2) of the Act expressly grants a right of civil recovery:

> In case of failure by any person to comply with the provisions of this article, the buyer shall have the right to recover from such person an amount equal to the credit service charge or charge imposed and the amount of any delinquency, collection, extension, deferral, or refinance charge imposed.

8 Hall v. Coburn Corp., 160 N.Y.L.J., Aug. 8, 1968, at 2, col. 3, *aff'd,* 31 App. Div. 2d 892, 298 N.Y.S.2d 894 (1969), *aff'd,* No. 16 (N.Y. Ct. App. May 13, 1970).

9 31 App. Div. 2d 892, 298 N.Y.S. 2d 894 (1969), *aff'd,* No. 16 (N.Y. Ct. App. May 13, 1970).

> actions initiated by private individuals and their lawyers can the imbalance be redressed.[10]

The court expressed empathy with the plight of "the poor victimized by this type of credit practice"[11] but refused to reverse the line of New York cases or to follow available contrary authority, thus denying an effective remedy to plaintiffs injured by invalidly assessed service charges. The court expressed as a reason for not revising the rule the view that the legislative machinery in question did not go to "the base of the problem" which it said was "economic." The court said that "it is doubtful if any public good can be accomplished by making a finance company pay back legally permissible credit charges in an indefinite number of contracts because the type is too small on printed parts of the contract."[12]

But it is for the legislature, not the court, to determine whether it serves the "public good" to provide that contracts printed in less than eight-point type should not constitute a contractual basis for service charges. The legislature had determined that making the finance company pay back credit charges based on such small-type contracts is in the public interest.[13] When the court holds that this is in the nature of a "technicality" which does not go to "the base of the problem," it makes a wholly irrelevant distinction. If the requirement is a technicality, it is one which must be complied with if credit charges are to be valid under New York law.

There can be no doubt that to afford aggrieved customers an opportunity to bring a class action for recovery of credit charges too small to justify individual suits is a benefit to them—a benefit which measures the difference between getting their money back or not getting their money back. Thus, the court was off the mark when it considered whether the statute involved properly addressed the problems of consumers, including the poor. It likewise got off the mark when it attempted to weigh the public policy of protecting the poor against the public policy of preventing harassment of suppliers or finance companies who deal with the poor.

The real questions raised in *Hall* was whether or not the legislative objective of the Act was to be given full sweep by affording processes which would make it practical to seek court relief. If, in order to do so, the class action would be so subject to abuse that an inordinately onerous burden would be placed on the defendant, then the court should have revised the class action rules enunciated in its previous decisions in a way that would avoid imposing such a burden. But it should not have refused to revise them at all.

The court was apparently making some such evaluation when it said:

> The public value of judicial sanction to this kind of class action which would harass a finance company underwriting credit sales without addressing itself to the real evil of retail credit buying is open to substantial doubt.[14]

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10 No. 16 (N.Y. Ct. App. May 13, 1970).
11 *Id.*
12 *Id.*
13 See notes 6-7 *supra.*
14 No. 16 (N.Y. Ct. App. May 13, 1970).

But, in striking the balance, the court made its own determination that an infinitesimal impact on credit evils is outweighed by infinite harassment of finance companies.

That the legislature had declared that credit evils should be and are to be curbed by use of the judicial process should have been an adequate incentive for the court to set itself to the task of making its processes afford other than a theoretical right and a chimerical remedy.[15] Unfortunately, it was not.

2. Snyder v. Harris

What about the diversity jurisdiction of the federal courts as a means of affording consumers the advantages of rule 23 of the Federal Rules of Civil Procedure? Most consumer class suits would involve quite large sums of money in total damages alleged and reasonably in controversy. It would appear that they are important enough, moneywise, to engage the federal courts. But the Supreme Court's ruling in *Snyder v. Harris*[16] does not permit plaintiffs having "separate and distinct claims" against a common defendant to aggregate these claims so as to make up the necessary $10,000 amount in controversy.

Because, as we have seen, the mischief visited on a great many consumers entitles them to only modest pecuniary relief, it is only through the amalgamation of several and distinct claims that many consumers will be able to reach the $10,000 jurisdictional amount prescribed by 28 U.S.C. 1332. *Snyder v. Harris* effectively forecloses that possibility.

C. Governmental Agencies as Consumer Advocates

The discussion has thus far centered on the difficulties encountered by the consumer when he seeks to press his claim in the courts. Before turning to an analysis of the measures being considered by Congress to remedy the legal infirmities that currently hamper the consumer in his quest for redress through the courts, let us briefly explore the avenues to relief afforded the consumer by governmental agency action.

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15 Unfortunately, *Hall v. Coburn Corp.* is typical of state class action law. Similar unnecessarily restrictive state decisions can be found in such states as Mississippi, Massachusetts, Indiana, Ohio, Michigan, and Washington. Coulson v. Harris, 43 Miss. 728 (1871) (dismissal of class action to enjoin collection of an allegedly illegal tax); Spear v. H.V. Greene Co., 246 Mass. 259, 140 N.E. 795 (1923) (dismissal of class action on behalf of purchasers of stock notwithstanding fraudulent scheme to victimize "the ignorant and frugal poor"); Smith v. Sparks Milling Co., 219 Ind. 576, 39 N.E.2d 125 (1942); Davies v. Columbia Gas & Elec. Corp., 151 Ohio St. 417, 86 N.E.2d 603 (1949) (dismissal of class action to enjoin allegedly fraudulent public utility billing practices and to recover damages for past fraud); Freeman v. State-Wide Carpet Distribs., Inc., 365 Mich. 313, 112 N.W.2d 439 (1961) (dismissal of class action for injunctive relief and damages caused by allegedly fraudulent retail carpet sales); Puget Sound Alumni of Kappa Sigma, Inc. v. City of Seattle, 70 Wash. 2d 222, 422 P.2d 799 (1967) (claims of nonparties excluded from class action to recover illegal fees exacted by city).

Indeed, Philip Schrag, who serves as chairman of the Consumer Advisory Council of the New York City Department of Consumer Affairs, observed that the New York court's decision in *Hall* "means that consumers victimized by a pattern of abuse have no real remedy in the courts, except in California, which has a good class-action law." The Wall Street Journal, May 14, 1970, at 10, cols. 1-2. For an example of the benevolent treatment given the consumer class action by the California judiciary, see Daar v. Yellow Cab Co., 67 Cal. 2d 695, 433 P.2d 732, 63 Cal. Rptr. 724 (1967).

16 394 U.S. 332 (1969).

It is, of course, the Federal Trade Commission among federal agencies that has primary concern with consumer matters. Section 5 of the Federal Trade Commission Act condemns unfair or deceptive trade practices, and the Commission traditionally issues cease and desist orders to prevent these.[17] Let us see how the processes of this Commission have worked in fact. The case of Holland Furnace Company will serve as an illustration.

1. Holland Furnace Company

In December, 1936, the company agreed to a Federal Trade Commission consent order against certain misleading advertising claims.[18] Although complaints against the company continued,[19] a second proceeding was not initiated by the Federal Trade Commission until 1954.[20] Four years later a cease and desist order was issued prohibiting Holland "from engaging in a sales scheme . . . whereby its salesmen gain access to homes by misrepresenting themselves as official 'inspectors' and 'heating engineers' and thereafter dismantling furnaces on the pretext that this is necessary to determine the extent of necessary repairs."[21] Holland Furnace Company ignored the court decree enforcing the cease and desist order[22] and was heavily fined for contempt of court in 1965.[23]

The twenty-nine years which it took the Federal Trade Commission to bring the Holland Furnace Company to task demonstrates the danger of overdependence on administrative agencies for consumer protection. Administrative budgets and personnel are limited, and, in some cases, the statutory structure or powers of an agency may inhibit its effectiveness. It is also noteworthy that Holland Furnace Company continued its depredations notwithstanding a number of instances in which it was successfully sued for common-law fraud by individual homeowners.[24] Though individual homeowners successfully defended contract actions by Holland Furnace Company on the ground that their contracts had been induced by fraud,[25] this likewise did not inhibit Holland from going right on defrauding others.

The Holland Furnace saga illustrates the effect on interstate commerce of widespread consumer frauds. In sustaining the Federal Trade Commission's jurisdiction over Holland, the Seventh Circuit accepted findings that the company did business in some forty-five states and had over 15 million customers.[26] In view of the fact that consumer frauds have been estimated to involve several billion dollars worth of purchases annually,[27] it is hardly surprising that fraudulent practices materially affect interstate commerce.

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17 *See* 15 U.S.C. § 45 (1964).
18 *In re* Holland Furnace Co., 24 FTC 1413-14 (1936).
19 48 CONSUMER BULL., April, 1965, at 25-26.
20 *In re* Holland Furnace Co., 55 FTC 55 (1958), *aff'd*, 295 F.2d 302 (7th Cir. 1961).
21 *Id.* at 91.
22 *In re* Holland Furnace Co., 295 F.2d 302 (7th Cir. 1961), *aff'g* 55 FTC 55 (1958).
23 *In re* Holland Furnace Co., 341 F.2d 548 (7th Cir.), *cert. denied*, 381 U.S. 924 (1965).
24 *E.g.*, Holland Furnace Co. v. Robson, 157 Colo. 378, 402 P.2d 628 (1965).
25 *E.g.*, Holland Furnace Co. v. Rounds, 139 Mont. 75, 360 P.2d 412 (1961); Holland Furnace Co. v. Korth, 43 Wash. 2d 618, 262 P.2d 772 (1953).
26 Holland Furnace Co. v. FTC, 269 F.2d 203, 209 (7th Cir. 1959), *cert. denied*, 361 U.S. 932 (1960).
27 *See* Comment, *supra* note 2.

2. Bureaucratic Process v. Court Process

I share Walter Gellhorn's disillusionment with bureaucratic process.[28] I believe the practicing bar is the American consumer's most powerful and appropriate champion and that the courts are the consumer's most effective forum.

In fashioning my part of the legislation that will be discussed in Part II of this article, I have followed this tenet: Good legislation must account for the existence of competing interests or forces which are otherwise self-motivated, and it must supply machinery, readily at hand, to accomplish the public purpose. The public purpose may be the sharing of increased productivity and the furtherance of industrial justice—as in the National Labor Relations Act—or it may be the extension of the availability of electric power—as in the TVA and REA programs.

II. Consumer Class Action Bills in Congress

A. The Judiciary Committee Bills

With this tenet in mind, Senator Tydings and I introduced companion bills in the spring of 1969.[29] These bills went to the respective Judiciary Committees of the Senate and House. They provided that federal district courts should have original jurisdiction, regardless of the amount in controversy, of civil actions brought by consumers similarly situated where the action complained of involved the violation of consumers' rights under state or federal statutory or decisional law for the benefit of consumers and where the alleged violation affected commerce. They provided further that rule 23 should govern the conduct of these actions.

In July, 1969, the Senate Subcommittee on Improvements in Judicial Machinery, of which Senator Tydings is chairman, held hearings to consider the merits of this legislation. I testified at those hearings. Other witnesses included Ralph Nader and Bess Myerson Grant, Commissioner of the Department of Consumer Affairs for the City of New York.

One witness, Mrs. Virginia Knauer, Special Assistant to the President for Consumer Affairs, presented an interesting, divergent approach to consumer protection. In her testimony she suggested legislation to permit consumer class action suits for the broad range of practices defined as "unfair or deceptive" under the Federal Trade Commission Act.

B. The Commerce Committee Bills

After the hearings, Senator Tydings and I concluded that Mrs. Knauer's proposal was a valuable one and that it could be used to complement the legislation that we introduced in the spring. We then encompassed it in new

28 *See* W. GELLHORN, INDIVIDUAL FREEDOM AND GOVERNMENTAL RESTRAINTS (1956).

29 S. 1980, 91st Cong., 1st Sess. (1969); H.R. 11656, 91st Cong., 1st Sess. (1969). Senator Tydings discusses consumer class action legislation in Tydings, *The Private Bar—Untapped Reservoir of Consumer Power*, 45 NOTRE DAME LAWYER 478 (1970).

companion bills, S. 3092 and H.R. 14585, which went to the respective Commerce Committees of each body. Here is what those companion bills provide:

First, they amend the Federal Trade Commission Act to provide that consumers who have been damaged by unfair or deceptive practices in commerce are entitled to bring civil suits in the form of class actions.[30] Under present law the Federal Trade Commission Act provides only for the processing of cases against persons engaged in unfair or deceptive practices by the Commission itself.

Second, they make an "act in defraud of consumers which affects commerce" an unlawful act which will give rise to a civil action triable in the district courts of the United States.[31] Such suits may be tried without regard to the amount in controversy. An "act in defraud of consumers" is defined as including two distinct things: An unfair or deceptive act or practice that the Federal Trade Commission Act condemns in section 5(a)(1), and an act which gives rise to a civil action by a consumer or consumers under state statutory or decisional law for the benefit of consumers.

Such a suit in federal court would apply the law of the states in exactly the same manner that the federal courts apply such law in a diversity of citizenship case. Thus, the court in any suit would be dealing with a definite body of law in a manner in which it is accustomed to deal with such law; there would be nothing unfamiliar in the bills which would make it difficult for the court to proceed according to customary practices. For instance, the conflict-of-laws principles which the forum ordinarily applies in diversity cases would establish the law applicable to any set of facts before the court.

It is very important in these bills, however, that the substantive offenses, initially spelled out in state law, be considered as federal offenses triable in a federal court and that the basis for jurisdiction be without respect to amount in controversy.

Of course, suits in federal court on diversity of citizenship can presently be tried on the basis of state substantive law, just as suits under these bills would be tried — with one exception: There is no minimum jurisdictional amount in the proposed act. This is important because, as we have said, in *Snyder v. Harris* it was held that claims of the individuals in the class action cannot be aggregated toward the $10,000 minimum.

Also introduced in the Commerce Committee was the Administration's own bill.[32] This bill provides for class actions only after a "triggering" device under which the Attorney General and the Federal Trade Commission must proceed to a final cease and desist order in the district court before a consumer may bring a class action.[33]

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30 H.R. 14585, 91st Cong., 1st Sess. § 2 (1969); S. 3092, 91st Cong., 1st Sess. § 2 (1969).
31 H.R. 14585, 91st Cong., 1st Sess. § 4 (1969); S. 3092, 91st Cong., 1st Sess. § 4 (1969).
32 H.R. 14931, 91st Cong., 1st Sess. (1969). The House bill was introduced on November 20, 1969, by Congressman Staggers; a companion bill in the Senate, S. 3201, 91st Cong., 1st Sess. (1969), was introduced on December 3, 1969, by Senator Magnuson.
33 *See* H.R. 14931, 91st Cong., 1st Sess. § 204 (1969); S. 3201, 91st Cong., 1st Sess. § 204 (1969).

C. The Two Bases of Substantive Law

It will be seen that, though all of the bills which have been introduced culminate in some form of class action process governed by federal rule 23, the substantive law applied by the process stems from two general sources: a state law source and a federal law source.

1. State Law Source

The state law source is exemplified by the Tydings-Eckhardt bills that went to the Judiciary Committee.[34] Those bills also make such federal law as there now is in the consumer field the basis for a class action under rule 23, but that would generally be the case anyway. Their important ingredient is the provision that essentially *state* law for the benefit of consumers is adopted as *federal* law and may be pursued under the class action process provided under federal rule 23.

Essentially the same process is provided in the original draft of the Commerce Committee bills.[35]

2. Federal Law Source

Administration Approach. The Administration approach respecting the federal law source is the most restricted: no action may be brought by an individual or class until the government has successfully terminated its own lawsuit.[36] Under this unprecedented approach, the Attorney General and the Federal Trade Commission stand like traffic policemen giving the green light to one group of would-be litigants and the red light to others. There are four compelling reasons why this approach is unacceptable.

First, most defrauded individuals would have no remedy because the government cannot possibly act in more than a small fraction of all the cases of deceit and overreaching against consumers. The Federal Trade Commission currently receives about 9,000 complaints a year. It is able to investigate only one out of eight or nine of these, and of the small fraction investigated, only one in ten results in a cease and desist order.[37] To achieve this record, the Federal Trade Commission has a staff of 1,200, including 500 lawyers. It operates on a $14 million annual budget.[38]

To accomplish the purpose outlined for it under the Administration bill, the Justice Department proposes to establish a division of thirty persons for the first year on a budget of $1.3 million. Sixty persons are envisioned for the second year.[39] If existing staff members are to be assigned to do this work, it is dif-

34 S. 1980, 91st Cong., 1st Sess. (1969); H.R. 11656, 91st Cong., 1st Sess. (1969).
35 S. 3092, 91st Cong., 1st Sess. (1969); H.R. 14585, 91st Cong., 1st Sess. (1969)
36 *See* H.R. 14931, 91st Cong., 1st Sess. §§ 204-5 (1969); S. 3201, 91st Cong., 1st Sess. §§ 204-5 (1969).
37 *See* E. Cox, R. Fellmeth & J. Schulz, "The Nader Report" on the Federal Trade Commission 58-59 (1969).
38 *Id.* at 87.
39 *See Hearings on Class Actions and Other Consumer Protection Procedures Before the Subcomm. on Commerce and Finance of the House Comm. on Interstate and Foreign Com-*

ficult to see how they could do it without neglecting other duties, because Attorney General Mitchell has testified that, at least with respect to organized crime, "a substantial increase in manpower is absolutely necessary to deal with the magnitude of the problem."[40] Clearly, in view of FTC operating experience, an office of thirty persons in the Justice Department is an unrealistic proposal.

Second, small consumers would first have to influence the Department of Justice to seek relief for them. Often poor, sometimes uneducated, and frequently somewhat skeptical of the government to begin with, the small consumer might have little success in convincing an agency of the federal government to proceed with his case, and unless he were successful, he could not proceed on his own. Thus, the consumer, in order to prevail, would have to press his case twice: once before the Justice Department and the Federal Trade Commission and then again, if he were lucky, before the court.

Third, the Federal Trade Commission tends to be attuned to those it regulates, and the consumer is at a disadvantage as against administrative lawyer-lobbyists. Extensive lobbying by corporate law firms, along with their frequent representation of corporate clients before the Federal Trade Commission, affords an opportunity for these lawyers and lobbyists to learn the intricacies of Commission practice and the modes of influencing a decision. Furthermore, as is well known, the normal route of advancement for agency experts is to move to the employ of the corporations that they have formerly helped to regulate. In this milieu, the small voice of the consumer may not be heard.

Fourth, the triggering device would give the Attorney General or the Federal Trade Commission the power to favor one competitor over another. Can government legitimately establish that certain acts are prohibited and that their commission may result in civil liability but then afford a remedy only to those whom the government chooses to single out? Suppose Montgomery Ward and Sears Roebuck both retail chain saws whose lubrication systems are allegedly so defective that the saw links fall apart. But then suppose the Attorney General chooses to sue only Montgomery Ward. If the Attorney General is successful, he opens up a flood of civil litigation against Montgomery Ward; but Sears Roebuck, which may be equally derelict, is insulated from civil suit.

House Subcommittee Preprint Approach. Under the approach contained in the House Subcommittee Preprint, that is, the draft that the Subcommittee worked on in formulating the bill finally recommended, the federal law basis was handled in this way:

Instead of providing that the government must obtain a final order before an affected party can proceed with a class action, the Subcommittee Preprint provided that the Federal Trade Commission should make general rules, violations of which would give rise to consumer class actions by any person affected.[41]

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merce, 91st Cong., 2d Sess. 209-10 (1970) (testimony of Assistant Attorney General McLaren) [hereinafter cited as *Hearings*].

40 *Hearings on Appropriations for the Dep'ts of State, Justice, and Commerce, the Judiciary, and Related Agencies for 1970 Before a Subcomm. of the House Comm. on Appropriations,* 91st Cong., 1st Sess., pt. 1, at 216 (1969).

41 H.R. ——, 91st Cong., 2d Sess. § 302 (Subcomm. Preprint of "Consumer Class Action Act" May 4, 1970).

Though the initial time for establishment of the rules would occupy considerable time, once a rule was made it would be applicable to all, and at least most of the objections to the Administration approach would be obviated. Also, the Subcommittee Preprint would have allowed consumer class actions to be brought immediately, without any requirement of prior administrative action, where the act complained of involved a violation of consumer rights protected under state statutory or decisional law for the benefit of consumers.[42]

Senate Committee Approach. The Senate Committee approach[43] resembles and grows out of the provisions of the original S. 3092 and H.R. 14585, which we have called the Commerce Committee bills. It provides that a violation of section 5 of the Federal Trade Commission Act gives rise directly, and without any triggering device, to a consumer class action in the courts.

There are some difficulties with this approach, though it cannot be faulted as severely as the Administration approach. The difficulty is that the language of section 5 condemning unfair or deceptive acts is the kind of broad, general language that is frequently used to define the area in which a commission may regulate. It is envisioned that the Commission, in exercising its administrative authority, will further refine the limitations and define what constitutes unfair and deceptive practices.

D. Bill From House Subcommittee

The Subcommittee on Commerce and Finance of the Committee on Interstate and Foreign Commerce in the House, acting on the Subcommittee Preprint, accepted the Administration approach to class actions based on federal law. Thus, it listed eleven specific practices which give rise to civil class actions and it approved the triggering device.[44] Standing alone this, of course, would be subject to the four criticisms previously leveled at the Administration approach. But the Subcommittee adopted, in another title, a provision for class actions to be brought in the case of *"an act or omission . . . which gives rise to a civil action by . . . consumers under State statutory or decisional law for the benefit of consumers."* Of course, for such act or omission to give rise to a federal civil class action, the act must have been *"a part of the business of a supplier whose business affects commerce."*[45]

"In order for an action to be entertained" the action must be *"of such nature as to be entertainable under rule 23 of the Federal Rules of Civil Procedure."*[46] The court would determine this in a pretrial hearing as is now done under rule 23.

So far, these provisions in the Subcommittee report have the identical effect of similar provisions in the Judiciary Committee bills and the original Commerce Committee bills introduced by Senator Tydings and Representative Eckhardt. However, the new provisions for class actions contain four substantial alterations:

42 *Id.* § 201.
43 Senate Commerce Comm. Draft Amendment of S. 3201, 91st Cong., 2d Sess. (1970).
44 H.R. 14931, 91st Cong., 1st Sess. § 201 (Comm. Print Showing H.R. 14931 as Ordered Reported by Subcomm. June 2, 1970).
45 *Id.* § 301(a).
46 *Id.* § 301(b).

First, it is expressly stated that the "*jurisdiction of the district courts of the United States . . . shall be concurrent with that of the courts of the several States.*"[47] Further, when the state court tries the case filed under this federal statute, it must apply the provisions of rule 23 of the Federal Rules of Civil Procedure.[48]

Second, since such federal cases are made triable in state courts under federal rule 23, it is now possible to permit the federal district court almost full discretion to dismiss without prejudice to refiling the case *as a federal case* in the state court. But in doing so the federal court must consider:

> *(A) the nature and importance of the case;*
> *(B) the condition of its docket and the likelihood that the matter would unduly delay other cases;*
> *(C) the multidistrict or multistate nature of the matter; and*
> *(D) the relative procedural advantages of trying the case in the Federal or in the State court.*[49]

Third, the federal court is limited in its jurisdiction to cases in which the amount in controversy exceeds $25,000, but the requisite jurisdictional amount may be established by aggregating the claims of all members of the class.[50] Such requisite amount in controversy is not applicable to the jurisdiction of a state court trying the case under federal law.

Fourth, in order for a person to be a member of the class, either in the state or federal court, his loss must exceed ten dollars.[51]

Like all previous versions of the class action provisions based on state substantive law, the bill reported by the Subcommittee does not prevent a plaintiff from seeking redress solely under state law and proceeding to trial under state law. The adoption of state law as federal law does not result in grounds for removal on the basis that a federal question is raised merely by invoking state law which could also be the basis of a federal action. It is provided:

> *Section 1441 of title 28, United States Code, shall not apply with respect to any action of which the district courts have jurisdiction solely by reason of section 301(c).*[52]

The election given to the plaintiff to proceed in either the state or federal court is just what is done with respect to *in personam* maritime claims in the "savings clause" of 28 U.S.C. Section 1333. Removal under section 1441 is not a constitutionally compelled but a prudential disposition, subject to whatever qualification Congress may dictate.

III. Conclusion: The Federal Concern

It has been pointed out in Part I that the need for consumer protection

47 *Id.* § 301(c).
48 *Id.*
49 *Id.* § 302(b)(2).
50 *Id.* § 302(b)(1).
51 *Id.* § 301(d).
52 *Id.* § 303.

is not met by individual suits, by existing class action law, or by governmental agencies acting as consumer advocates. The various legislative approaches to the problem have been outlined in Part II, and it has been shown that these utilize two bases for substantive law: the federal source and the state source.

It remains to be shown that legislative action is not only needed but that it is a matter of federal concern properly within the authority of Congress under the commerce clause. If this be shown, then, of course, the federal courts can constitutionally try cases arising under the congressional legislation because such cases would fall in the category of "cases in Law and Equity arising under . . . the laws of the United States . . . ."[53]

Since the House Subcommittee bill has, at the time of this writing, advanced farther in the legislative process than any other version, it will be the primary legislation discussed here.

A. The Nature of Federal Concern

Title I of the Subcommittee bill makes the finding that *"there is a Federal interest in curbing unfair and deceptive practices which affect commerce."*[54] What is the federal need, the federal concern, in the field of deceptive practices which affect commerce? Two needs immediately suggest themselves: (1) the need for an effective process for consumers, where their transactions affect commerce, to obtain justice in the American marketplace, and (2) the need for a process which is uniform enough and sufficiently national in scope to bring together as plaintiffs in a single suit classes of consumers which are nearly always potentially nationwide.

There is not only a federal interest in class actions, but a practical necessity that the problem be dealt with federally if a process adequate to take care of this type of litigation, as a whole, is to be devised. Such is particularly true where the action involves a broad class of consumers dealing with businesses affecting interstate commerce. That is all that is dealt with in this bill. An examination of how a federal court deals with these matters in a multidistrict situation illustrates the point.

The Coordinating Committee for Multiple Litigation, composed of federal judges familiar with the large class action, has promulgated a *Manual for Complex and Multi-District Litigation.* In it, it is recommended that at a first principal pretrial conference a schedule be established for early determination of the class action questions (such as discovery) in all potential class actions under rule 23, Federal Rules of Civil Procedure.[55]

Frequently, the same kind of case arises in several districts with one set of plaintiffs asking to represent all similarly situated persons nationwide. Thus, the schedule for determination may refer all the cases to a single judge who will, in the second principal pretrial conference, determine the class action issue. Other-

53 U.S. CONST. art III, § 2.
54 H.R. 14931, 91st Cong., 1st Sess. § 102 (Comm. Print Showing H.R. 14931 as Ordered Reported by Subcomm. June 2, 1970).
55 CCH, MANUAL FOR COMPLEX AND MULTI-DISTRICT LITIGATION 36 (n.d.).

wise, there would not only be a number of courts deciding issues resting on the same set of facts in separate, frequently lengthy proceedings, but there would be confusion as to which group of plaintiffs represents the class. There would also be the potential of conflicting determinations by different judges as to the rights of the members of the class whose interests are separately adjudicated.

These are problems that exist now, under existing law. They are not insurmountable when they arise in federal courts. They are, or may be, to say the very least, very difficult when they arise in state courts under state law. Obviously, there is a strong federal interest in affording an orderly procedure for protecting members of the class who reside all over the nation.

B. Congress Can Provide a Forum for the Enforcement of State Law

Professors Harry Wellington and Alexander Bickel in their comments on the very similar problem in connection with section 301(a) of the Labor Management Relations Act, say:

> The point is simply that providing a forum for the enforcement of state law in a field which Congress could occupy is itself a species of regulation, a way of seeking a degree of uniformity while leaving the maximum room for the exercise of initiative by the states. It is a way of striving for a measure of co-ordination by consent and persuasion — a way of setting up something like a clearing house of ideas. . . . Since the federal circuits do influence each other and operate under a single Supreme Court, this contribution in turn is bound to tend in the direction of harmonizing state policies. . . . It would be most regrettable if a federal constitution forbade the general government to exercise its regulatory powers in this forbearing, sanguine, and initially perhaps experimental manner which turns to account the genius of a federal system.[56]

There is another rationale and another line of cases supporting the House Subcommittee bill's utilizing state law as federal law. State law (which protects consumers) is adopted and incorporated into federal law and is applied as federal law in actions brought in the district courts under the provisions of the proposed act.[57] There is no question but that state law may be adopted as federal law in this way.

In *Sharpnack v. United States*,[58] the Supreme Court confronted the fact that Congress had adopted, as federal law for federal enclaves, all existing and future state criminal statutes. The Court sustained this action and in an opinion written by Mr. Justice Burton, and joined by Justices Brennan, Clark, Harlan, Whittaker and Frankfurter, and Chief Justice Warren, stated:

> There is no doubt that Congress may validly adopt a criminal code for each federal enclave. It certainly may do so by drafting new laws or by copying laws defining the criminal offenses in force throughout the State in which the enclave is situated. . . . Whether Congress sets forth the

56 Bickel & Wellington, *Legislative Purpose and the Judicial Process: The Lincoln Mills Case*, 71 HARV. L. REV. 1, 20 (1957).

57 H.R. 14931, 91st Cong., 1st Sess. §§ 301-2 (Comm. Print Showing H.R. 14931 as Ordered Reported by Subcomm. June 2, 1970).

58 355 U.S. 286 (1958).

> assimilated laws in full or assimilates them by reference, the result is as definite and as ascertainable as are the state laws themselves.
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> . . . Rather than being a delegation by Congress of its legislative authority to the States, it is a deliberate continuing adoption by Congress for federal enclaves of such unpre-empted offenses and punishments as shall have been already put in effect by the respective states for their own government. . . . This procedure is a practical accommodation of the mechanics of the legislative functions of the State and Nation . . . .[59]

Federal enforcement of state civil law is in fact commonplace. The Federal Tort Claims Act leaves the question of liability to be determined by the law of the state where the negligent conduct occurred.[60] In *Maryland v. United States*[61] the court explained the rationale behind the Federal Tort Claims Act:

> Congress was creating a liability not theretofore existing on the part of the government. To have defined all of the tort rules under which liability could be established would have been an almost impossible undertaking; but standards of liability were necessary and Congress was compelled, as a practical matter, to adopt the principles and standards of local law in defining them.[62]

It seems now well accepted that federal law can assimilate state law as has been done in admiralty and limitation proceedings,[63] in bankruptcy laws,[64] in the admissibility of evidence,[65] in defining "children" under the Copyright Act,[66] in the Emergency Price Control Act,[67] in tax law,[68] and in other instances.[69]

C. House Subcommittee Bill Properly Addresses Federal Concern

As reported out of the House Subcommittee on Commerce and Finance, H.R. 14931 is a sound approach to the problem of affording access to the courts for consumers. Though its title II embraces almost verbatim the Administration bill[70] — and standing alone would be most inadequate — title III follows the pattern of the Tydings-Eckhardt bills and supplies the general *corpus juris* for consumer class suits relying on state law. To paraphrase *Maryland v. United States*: To have defined all of the rules governing deceit and overreaching as federal law under which liability could be established would have been an almost impossible undertaking; but standards of liability are necessary and Congress is

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59 *Id.* at 293-94.
60 *See* 28 U.S.C. §§ 1346(b), 2674 (1964).
61 165 F.2d 869 (4th Cir. 1947).
62 *Id.* at 871.
63 *Cf.* The Tungus v. Skovgaard, 358 U.S. 588 (1959).
64 *See* 11 U.S.C. § 24 (1964).
65 FED. R. CIV. P. 43(a).
66 *See* De Sylva v. Ballentine, 351 U.S. 570, 580 (1956).
67 *See* 1A J. MOORE, MOORE'S FEDERAL PRACTICE ¶ 0.323[22] (1965).
68 Morgan v. Commissioner, 309 U.S. 78 (1940); Blair v. Commissioner, 300 U.S. 5 (1937).
69 *See* United States v. Sharpnack, 355 U.S. 286, 294-96 (1940) for additional instances where this practice was followed.
70 *Compare* H.R. 14931, 91st Cong., 1st Sess. §§ 201-10 (Comm. Print Showing H.R. 14931 as Ordered Reported by Subcomm. June 2, 1970) *with* H.R. 14931, 91st Cong., 1st Sess. §§ 201-10 (1969) *and* S. 3201, 91st Cong., 1st Sess. §§ 201-10 (1969).

compelled, as a practical matter, to adopt principles and standards of local law in defining them.[71] This is title III.

But it is not amiss to move gingerly in the area of defining certain federal standards. The eleven standards of title II, too restrictive standing alone, may be desirable as a cautious approach to adoption of such standards. I, myself, would not like to see us construct a two-track railroad, one track for relief being state substantive law covering the entire field and the other being federal substantive law of equally comprehensive scope. That is the reason general reliance on state law with cautious supplementation by federal substantive provision is my recommendation. The Subcommittee bill is not sufficiently precise in its title II to fit this pattern perfectly. The Subcommittee Preprint would have been better. But since title III has been quite well perfected and would grant real and meaningful relief to consumers at their own behest and without a "triggering" device, the bill is, in my opinion, an adequate vehicle for consumer relief, and its passage would be a step toward justice and reform comparable in this day to the passage of the Clayton Antitrust Act in the days of President Wilson.

71 *See* Letter from Charles L. Black, Jr. to Congressman Bob Eckhardt, May 27, 1969, reprinted in *Hearings* 23, 24.